10-30-2020

STRATEGIC JUBILEE HOLDINGS ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Kelly Lee Ellerbee

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

STRATEGIC JUBILEE HOLDINGS, LLC and JUBILEE MANAGER, LLC

Plaintiffs,

v.

Civil Action File No. 2016CV283484

JUBILEE DEVELOPMENT PARTNERS, LLC, MINCHEW ENTERPRISES, LLC, RONALD REESER, MASON DRAKE and KENNETH MINCHEW,

Defendants.

JUBILEE DEVELOPMENT PARTNERS, LLC, MINCHEW ENTERPRISES, LLC, RONALD REESER,and KENNETH MINCHEW and JUBILEE MANAGER, LLC,

Counterclaimants,

v.

STRATEGIC JUBILEE HOLDINGS, LLC, JUBILEE INVESTMENT HOLDINGS, LLC, STRATEGIC REAL ESTATE OPPORTUNITY FUND, LLC, JAMES FREEMAN, and RICKBY B. NOVAK,

Counterclaim-Defendants.

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Before the Court is Plaintiffs' Motion for Partial Summary Judgment, filed October 22, 2019 ("Motion").[1] Having reviewed the record and considered the arguments of counsel during a hearing on October 19, 2020, the Court enters the following order.

1. STANDARD OF REVIEW

In Fulton County v. Ward-Poag, 2020 WL 5883344, at *3 (Ga. October 5, 2020), the Georgia Supreme Court recently reiterated the "well-established principles" guiding a trial court's review of a motion for summary judgment. "A trial court can grant summary judgment to a moving party only if there are no genuine issues of material fact and the undisputed evidence warrants judgment as a matter of law. See O.C.G.A. § 9-11-56(c). In reviewing the evidence, a court must construe all facts and draw all inferences in favor of the non-movant." Ward-Poag expressly relied on Messex v. Lynch, 255 Ga. 208, 210 (1985) that further provides, "[t]he party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists, and the trial court must give that party the benefit of all favorable inferences that may be drawn from the evidence."

2. FINDINGS OF FACT

Ronald Reeser long held a desire to develop 2,718 acres of land located in Santa Rosa County, Florida (the "Property"). He previously owned the Property with a former partner and spent millions of dollars laying the groundwork for the site to be developed, including efforts at land planning, re-zoning, infrastructure development, and endangered species mitigation. (Reeser Aff., filed Dec. 14, 2016, ¶ 3.) These development plans failed, and the Property ultimately

[1] Consideration of this Motion was stayed for several months by the agreement of counsel so they could fully explore an amicable resolution of this dispute. (Consent Order Staying Case, entered January 4, 2020; Consent Order Setting Deadlines and Hearing, entered August 19, 2020.) During this time, case deadlines were also stayed as a result of emergency judicial orders entered by the Georgia Supreme Court in light of the COVID-19 pandemic.

became part of a bankruptcy estate, controlled by a bankruptcy receiver who placed it for sale. (Reeser Dep., pp. 31, 35-36.) The Property was subject to a 2013 consent order between a prior interest holder and the Florida Department of Environmental Protection requiring wetlands remediation. (Id., pp. 95-96; Pl. Ex. 31.) The Property's sale was conditioned upon the buyer agreeing to perform the required remediation, estimated to cost $832,000, in addition to the purchase price. (Id., pp. 53-54, 96-97.)

On December 14, 2014, Natural Resource Management, LP ("NRM"), an entity owned by Reeser, Mason Drake, and non-party Patrick Maher, contracted to purchase the Property for $3.9 million, depositing $150,000 in earnest money. (Def. Resp. to Pl. SUMF, Ans. No. 1; Pl. Ex. 21.) However, because NRM and its principals lacked the funds necessary to close on the sale or perform the required remediation, investors were needed, and the initial closing deadline of February 17, 2015 made the search for such investors time-sensitive. (Reeser Dep., pp. 55-56; 78-79; Sikes Dep., pp. 30-31.)

Through a mutual acquaintance, non-party Clay Sikes, Drake set up a meeting where he, Reeser and Kenneth Minchew, who was also working to develop the Property, met with Atlanta-based investors James W. Freeman and Ricky B. Novak. (Drake Dep., pp. 31-32, 42-43; Reeser Dep., pp. 56-57.) As generally described by Defendants, this group agreed on a plan "to develop part of the Property, and to sell conservation easements in the remainder, which would monetize the valuable tax breaks to individuals who subscribed." (Def. Am. Resp. to Pl. MSJ, p. 4.)

"Jubilee" was the shorthand name for the project, and the framework of the deal involved numerous entities. The Property would be owned by Jubilee Investment Holdings, LLC ("JIH"), and Jubilee Manager, LLC ("JM") would manage JIH and lead efforts to develop the Property.[2]

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[2] The JIH Operating Agreement will be cited as the JIH Agreement. (Pl. SUMF, Ex. 5.) The JM Operating Agreement will be cited as the JM Agreement (Pl. SUMF, Ex. 3.)

The deal participants created or used other entities in which they had an interest to help facilitate the deal: Strategic Jubilee Holdings, LLC ("Strategic") was an entity affiliated with the Atlanta investors Freeman and Novak; River Life Investments, LLC ("River Life") was an entity affiliated with Sikes; Jubilee Development Partners, LLC ("Jubilee Development") was an entity formed by Reeser and Drake, and Minchew Enterprises, LLC ("Minchew Enterprises") was a pre-existing entity owned by Minchew and his family members.[3] (Drake Dep., p. 51; Reeser Dep., p. 118; Minchew Dep., pp. 30-32.)

JIH would have three initial members in two ownership classes. Class A units in JIH were held by Strategic and another entity affiliated with Freeman and Novak, Strategic Real Estate Opportunity Fund, LLC ("SREOF"). (JIH Agreement, § 7.1, Ex. B.) JM was to make a capital contribution of $375,000 and receive 15 Class B units in JIH.[4] (Id., § 7.2, Ex. B.) JM would have four members: Strategic, River Life, Jubilee Development, and Minchew Enterprises. (Def. Resp. to Plaintiff's SUMF, Ans. No. 6.) Three would make a $75,000 initial capital contribution and each receive a 20% ownership interest in JM except Jubilee Development would make a contribution of $150,000 and receive a 40% ownership interest. (Id., Ans. No 7; JIH Agreement, § 7.2.) The $375,000 total amount of initial capital contributions to be made by JM's members was the same amount JM would make in a capital contribution to JIH.

On February 11, 2015, while the structures of JIH and JM were still being negotiated, NRM assigned its right to purchase the Property to JIH for a $300,000 fee plus replacement of NRM's $150,000 in earnest money. (Def. Resp. to Pl. SUMF, Ans. No 2.) This $300,000 fee was separate

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[3] Jubilee Dev. Partners, LLC v. Strategic Jubilee Holdings, LLC, 344 Ga. App. 204, n. 2-4 (2018) cert. denied Aug. 2, 2018.

[4] In connection with a $25,000 loan made by Strategic, it also held 1 Class B unit. (JIH Operating Agreement, ¶¶ 5.5.3 and 7.1.)

from the $3.9 million purchase price for the Property. (Id., Ans. No. 3; Pl. SUMF Ex. 27.) The February 2015 closing was ultimately delayed, and the parties continued to negotiate questions involving the creation and structure of JIH and JM until the final closing date, March 31, 2015. (Reeser Dep., pp. 116; 130.)

The deal participants discussed how initial capital contributions to JM would be made and then, in turn, would be used to fund JM's initial capital contribution to JIH. Strategic and River Life planned to pay their capital contributions immediately, so these discussions focused on the $225,000 collectively due from Jubilee Development and Minchew Enterprises. (Id., Ans. No. 8.) Initially, Freeman and Novak anticipated the capital contributions of these two entities would be funded from disbursements made when the Property closed, particularly the $300,000 assignment fee NRW was to receive. (Freeman Dep., pp. 84, 146; Novak Dep., p. 54.) However, as the closing approached it became apparent the plan to use closing disbursements might not prove feasible as much of this $300,000 fee owed to NRM was pledged to pay other debts. (Novak Dep., p. 54-55; Reeser Dep., p. 126; Minchew Dep., pp. 64-66.) The deal participants reached some agreement that these obligations would initially remain unfunded, but they had no shared understanding how or when the contributions would be made.

On March 23, 2015, one week before the closing, Novak sent Defendants a lengthy email addressing the financial aspects of the deal with draft documentation regarding the creation of JIH and JM (the "March 23rd Email"). (Novak Dep., p. 82; Pl.'s SUMF, Ex. 15.) It outlined various fees and commissions that were anticipated to be paid as a result of the deal. It addressed the $300,000 that NRM would receive at closing, stating the money should be used to fund the initial capital contributions payable to JM from Jubilee Development and Minchew Enterprises.

However, Novak stated these contributions could "be deferred until a later point in 2015 if absolutely necessary." The March 23rd Email concluded,

> [a]s we previously discussed, we want [JM] to be properly funded based on everyone's equity interest so we expect everyone to truly fund $75,000 each . . . these amounts would need to be paid prior to the end of 2015 at the latest, and preferably be paid from the fees [anticipated to be disbursed at the closing] . . . Under this structure, we are all on equal footing from an initial capital contribution perspective. [JM] will have 15 Class B units and each $75,000 member of [JM] essentially / indirectly has 3 Class B units in [JIH].

Novak, Freeman, and Sikes all recount these two entities agreed to pay their capital contributions in cash by the end of 2015. (Freeman Dep. p. 89; Novak Dep., p. 87; Sikes Dep., pp. 182, 185-186; 195.) However, Reeser, Drake, and Minchew dispute there was any specific agreement these entities would be required to make a cash contribution at all. Drake and Minchew assert an agreement was reached that the capital contributions required of Jubilee Development and Minchew Enterprises would be offset from anticipated future streams of income generated by the Property such as real estate commissions, revenues from conservation easements or JM's distributions to its members from management and development fees received from JIH. (Drake Dep. pp. 61-63; 86-88; Minchew Dep., pp. 70-74; 76-77; 187-188.) Reeser asserts there was never any intent for Jubilee Development and Minchew Enterprises to pay their capital contributions. (Reeser Dep., pp. 133-141.) Rather, he claimed these two entities satisfied their capital contribution requirement simply by bringing the opportunity regarding the Property to JIH. He further claimed once the conservation easements, which he deemed to be quite lucrative, produced enough revenue so that Strategic and River Life were able to recoup their capital contributions, the obligation of Jubilee Development and Minchew Enterprises to pay their initial capital contributions would be forgiven, and all members would be placed on equal footing. (Id., pp. 133-139; 141.) He viewed the plan for the capital contribution to be satisfied through future

offsets as a "back up plan" should the anticipated revenue from the conservation easements fail to materialize. (Id., pp. 122-125.)

Although both the JIH Agreement and JM Agreement were executed either late on March 30, 2015 or early the next day before the sale of the Property closed, they both contain effective dates of March 10, 2015. (Freeman Dep. pp. 116; 142; Novak Dep., pp. 123-124; JIH Agreement, p. 1; JM Agreement, p. 1.) The JIH Agreement stated Strategic and SREOF each "has made (or will make)" their required capital contributions. (JIH Agreement, § 7.1.) It further stated JM "has made" its required capital contribution. (Id., §7.2.) The JM Agreement reflected that the initial capital contributions of Jubilee Development and Minchew Enterprises, respectively $150,000 and $75,000, had yet to be funded but made no mention of how or when the funding should occur. (JM Operating Agreement, § 7.1; Sched. A.) The JM Agreement further contained a merger clause. (JM Agreement, § 14.21.)

As reflected above, while the two companies were created at the same time and their operating agreements were contemporaneous, the JM Agreement unequivocally stated it had yet to receive the full $375,000 in capital contributions from its members while the JIH Operating Agreement indicated that JM had paid its full $375,000 capital contribution. (JIH Operating Agreement, § 7.2.) Freeman claims this was a scrivener's error in the JIH Agreement, discovered only after this litigation commenced. (Freeman Dep., pp. 340; 343-44.) However, this representation that JM had paid JIH the full amount of $375,000 it owed in capital contributions subsequently made its way into various other documents involving the project, including tax returns and solicitations to outside investors. (Sikes Dep. pp. 160-161; 165; Freeman Dep., pp. 148-149; 155-157; 271-272; 276-277; Novak Dep., pp. 142; 144 146.)

After JIH acquired the Property, JM, acting through Jubilee Development, began development efforts – overseeing and completing the required wetlands remediation, working on a market study, and selecting a land planner. (Reeser Aff., filed December 14, 2016, §§ 13-18.) JM was to be accorded a management fee from JIH for its efforts. (Freeman Dep., pp. 220-221; 313-315.)

On October 8, 2015, Freeman sent an email to Reeser, Novak, and Minchew reminding them of the capital contributions owed by Jubilee Development and Minchew Enterprises which "you all agreed to fund **before** year-end." (Emphasis in original.) (Sikes Dep., p. 195; Pl. SUMF, Ex. 38.) Reeser sent an email reply, "I prefer to wire . . ." (Pl. SUMF; Ex. 38.)

The dispute between the deal's participants regarding the nature of and due date for the unpaid capital contributions came to a head in an email exchange at the end of 2015 ("December 2015 Email Chain"). (Pl. SUMF, Ex. 7.) It began on December 28, 2015 when Freeman requested the entities to wire their contributions before December 31, 2015. (Id., p. SJH000363.) Minchew replied requesting Freeman resend him the wiring instructions. (Id.; Minchew Dep. pp. 77-78.) On December 28, 2015, Freeman provided the requested wiring instructions and asked Resser, Drake, and Minchew to send confirmation when they wired their funds. (SUMF, Ex. 7, p. SJH000362.) However, no funds were received.

On the evening of December 30, 2015, Freeman continued with the December 2015 email chain, sending an urgent request to Reeser, Drake, and Minchew, stating the funds needed to be wired the next day. (Id. at p. SJH000361.) Having received no funds, he sent another urgent request early on the afternoon of December 31, 2015. (Id.) Drake replied late in the afternoon, stating the demand for a capital contribution before year end was contrary to the deal originally

negotiated. (Id.) No contributions were received from Jubilee Development or Minchew Enterprises.

On January 26, 2016, Strategic wrote a letter to JM alleging it was in "material breach" of the JIH Agreement because it still owed $225,000 of its required capital contributions. (Pl. Ex. 10.) On February 24, 2016, Reeser responded, outlining his understanding that JM had satisfied the requirement to JIH providing $150,000.00 in cash and a note from JM for the remaining $225,000, and he suggested if the documentation was needed, Strategic should prepare it. (Def. Ex. F.) On February 26, 2016, Strategic unilaterally removed JM as manager of JIH based upon the failure to fund fully its required capital contribution. (Freeman Dep., p. 220.)

After JM was removed from JIH, Freeman and Novak determined they no longer wished to develop the Property and decided to donate a large portion of it to the State of Florida. (Reeser Aff., filed Dec. 14, 2016, ¶ 28.) In an effort to prevent this donation, on November 1, 2016, Defendants sued Strategic, JIH, River Life and others in Florida, seeking damages and injunctive relief for the alleged wrongful removal of JM as managing member of JIH. (Reeser Aff., filed Dec. 14, 2016, ¶ 30.) Subsequently, the Florida case was voluntarily dismissed.

As detailed below, Strategic and JM filed the instant suit. In the midst of this litigation, Strategic amended JM's 2015 tax returns informing revenue authorities the company's, "assets and contributions were overstated because two would-be partners failed to make their contributions and therefore, never satisfied the conditions for partnership." (Freeman Dep., pp. 291-292; 298-300; Def. Ex. G.) These amended returns reflect Strategic and River Life as the only members of JM. (Id.)

3. PROCEDURAL HISTORY

The instant lawsuit commenced in December of 2016. Strategic and JM filed the above-styled Complaint against Jubilee Development and Minchew Enterprises as well as their principals, Reeser, Minchew, and Drake, asserting three counts that deal solely with the management of JM. River Life is not named as a party, but it agreed Strategic would fairly and adequately represent its interests in the case. (Verified Complaint, ¶¶ 37 -38, Ex. 3.) Count I seeks a declaratory judgment that Jubilee Development and Minchew Enterprises are not members of JM because they failed to pay their required initial capital contributions. Alternatively, Plaintiffs raise two other claims. Count II is a breach of contract claim against the two entities for failing to make their initial capital contributions under the JM Agreement, and Count III is a breach of fiduciary duty claim against the individual Defendants Reeser, Drake, and Minchew, the managers appointed by Jubilee Development and Minchew Enterprises, for failing to cause these entities to pay their initial capital contributions. Plaintiffs also seek their expenses of litigation pursuant to O.C.G.A. § 13-6-11.

Defendants initially asserted 13 counterclaims and added Novak, Freeman, JIH and SREOF as Counterclaim Defendants. (Def. Am. Ver. Ans. and Counterclaims, ¶ 12.)[5] Three counterclaims involving JIH, Count I (breach of the JIH Agreement to pay development fees), Count II (breach of JIH Agreement to pay JM management fees), and Count VIII (breach of fiduciary duty against Strategic in relation to JIH and its member JM) are now being arbitrated as required by the arbitration clause of the JIH Agreement. (JIH Agreement, § 15.16.)

[5] Defendants first answered and moved to dismiss Plaintiff's Complaint under Georgia's anti-SLAPP statute. (Mot. to Dismiss, filed Dec. 15, 2016.) The Court's denial of the anti-SLAPP motion to dismiss was affirmed on appeal. Jubilee Dev. Partners. Following the appellate remand, Defendants asserted their counterclaims.

In the present Motion, Plaintiffs seek summary judgment on their claims for declaratory judgment and breach of contract. They also seek summary judgment for counterclaims including: Count III (fraud in the inducement), Count IV (negligent misrepresentation), Count V (conspiracy to commit fraud), and Count VI (promissory estoppel).

4. ANALYSIS

A. Plaintiffs' Claim for Declaratory Judgment

Plaintiffs seek a declaratory judgment that Jubilee Development and Minchew Enterprises are not members of JM. (Plaintiffs' Motion, p. 8.) The Court agrees with Defendants that Plaintiff have failed to set forth a proper claim for declaratory relief because Plaintiffs face no uncertainty with regard to a future action that a declaratory judgment was intended to address.

> It is a settled principle of Georgia law that the jurisdiction of the courts is confined to justiciable controversies, and the courts may not properly render advisory opinions. Declaratory relief therefore is inappropriate for controversies that are merely hypothetical, abstract, academic or moot, and a declaratory judgment will not be rendered based on a possible or probable future contingency because such a ruling would be an erroneous advisory opinion.

Strong v. JWM Holdings, LLC, 341 Ga. App. 309, 314 (2017) (Citations and punctuation omitted.) Without guidance from the Court, Strategic, purportedly acting as the manager of JM, amended JM's 2015 tax returns with the unequivocal statement that Jubilee Development and Minchew Enterprises were not members of JM because they failed to make their required capital contributions. Consequently, the declaratory judgment Plaintiffs now seek would simply be an advisory opinion regarding the propriety of a position they have already acted upon, rather than providing Plaintiffs with guidance against the uncertainty of their future conduct.

B. Plaintiffs' Claim for Breach of Contract

Alternatively, Plaintiffs argue the failure of Jubilee Development and Minchew Enterprises to pay their initial capital contributions is a breach of the JM Agreement. The record reveals the members of JM had differing ideas about the nature of and deadline for making their initial capital contributions, and Defendants present the Court with a virtual mountain of parol evidence regarding the intent of the parties. However, the key question the Court must first address is whether it may even consider evidence outside the four corners of the JM Agreement. "[U]nless an ambiguity exists, the court may not look outside the terms of the contract to consider surrounding circumstances or parol evidence. Indeed, when the language of the contract is clear and unambiguous, it will be enforced according to its plain terms, and the contract *alone* is looked to for meaning (emphasis in original.)" Yash Sols., LLC v. New York Glob. Consultants Corp., 352 Ga. App. 127, 141 (2019) (Citations and punctuation omitted.)

> Section 7.1 of the JM Agreement provides:
>
> The initial Capital Contributions of the Members are set forth on Schedule A attached hereto, however, certain Members have not yet funded their capital contributions to [JM] as of the Effective Date and, therefore, ***such amounts are deemed to be due*** from such Member as shown on Schedule A. (Emphasis supplied.)

Schedule A specifies the amount each member owed and which member's capital contributions had not already been paid. (JM Agreement, Schedule A.) An asterisk placed next to the required contributions of Jubilee Development and Minchew Enterprises lead to a note indicating it was the "amount due" to JM from these two members as their initial capital contributions have "not yet been made . . ." (Id.)

The Court finds the use of the word "due" in the JM Agreement creates an ambiguity because of its various connotations. The word "due" is commonly used to reflect amounts

immediately owed or, alternatively, it is often used to indicate amounts that are owed but are payable in the future. The ambiguity regarding the initial capital contributions is further reflected in a glaring inconsistency between the JIH Agreement and the JM Agreement, two contemporaneous contracts simultaneously creating two entities, both involved in the same transaction. See Lovell v. Thomas, 279 Ga. App. 696, 700 (2006) ("[w]hen an agreement consists of multiple documents that are executed at the same time and during the course of a single transaction, those documents should be read together.") These two contracts reflect the $375,000 in initial capital contributions owed to and owed by JM quite differently. One indicates JM has yet to receive the full $375,000 initially owed from its members, yet the other reflects that JM has paid the full amount it initially owed to JIH. Thus, the Court finds an uncertainty regarding just how and when Jubilee Development and Minchew Enterprises were to pay their initial capital contributions to JM. In order to resolve the ambiguity, the Court must "apply the rules of contract construction" and under these rules "parol evidence is admissible to explain an ambiguity in a written contract, although such evidence is inadmissible to add to, take from, or vary the writing itself." Atlanta Dev. Auth. v. Ansley Walk Condo. Assn., 350 Ga. App 584, 588 (2019). Here, the considerable parol evidence does not resolve the ambiguity. Indeed, the parol evidence indicates questions of fact exist among the deal's participants regarding how and when the unpaid contributions should be made thus precluding the entry of summary judgment on Plaintiffs' breach of contract claim.

C. Counterclaims

Counterclaimants assert that Novak, Freeman, Strategic, and SREOF (collectively the "Strategic Parties") either intentionally or negligently misrepresented that the initial capital

contributions payable by Jubilee Development and Minchew Enterprises could remain unfunded until JM made a disbursement of fees or profits earned through the acquisition or development of the Property. (Amended Answer and Counterclaims, ¶ 82.) As a result of these misrepresentations, Counterclaimants assert they were induced to (i) enter into the JM Agreement and JIH Agreement, (ii) assign their rights to acquire the Property to JIH and (iii) apply prior and future sweat equity to the development of the Property. (Id. at ¶ 84.) They make similar allegations in their promissory estoppel claim. (Id. at ¶ 103.) As concerns (ii), JIH's opportunity to purchase the Property was accomplished by a separate assignment contract with NRM that was executed on February 11, 2015, almost one month before the effective dates of the JIH Agreement and JM Agreement. NRM is not a party to this case, and it received $300,000 in separate consideration for its assignment contract. The Court does not find any fraud, misrepresentation, or estoppel claims related to the assignment contract to be properly before this Court.

i. Fraud-Related Counterclaims

Counterclaimants assert claims for fraud in the inducement, negligent misrepresentation, and conspiracy to commit fraud.[6] An essential element a party asserting any misrepresentation claim must demonstrate is its reasonable reliance on the information they claim to be false. Hicks v. Sumter Bank & Trust Co., 269 Ga. App. 524, 527 (2004) ("Reliance is an essential element of both fraud and negligent misrepresentation, and that reliance must be justified."). Counterclaimants have failed to demonstrate any disputed issue of fact exists regarding this essential element of their three fraud and misrepresentation counterclaims.

[6] Georgia does not recognize an independent cause of action for conspiracy. Dyer v. Honea, 252 Ga. App. 735, 738 (2001) ("[t]he cause of action for civil conspiracy lies not in the conspiracy itself, but in the underlying tort committed against the [claimant] and the resulting damage.")

In Raysoni v. Payless Auto Deals, LLC, 296 Ga. 156, 157 (2014), the Georgia Supreme Court stated,

> when one has entered a contract with a binding and comprehensive merger clause, any reliance upon precontractual representations is, generally speaking, unreasonable as a matter of law. Likewise, when one is bound by a contract that includes terms that expressly, conspicuously, unambiguously, and squarely contradict precontractual representations, any reliance upon those precontractual representations may be deemed unreasonable as a matter of law. (Citations omitted.)

Here, the JM Agreement contains a merger clause. It unequivocally provides, "all prior negotiations among the parties . . . are merged in this [JM] Agreement and there are no other promises, agreements, conditions, undertakings, warranties or representations, oral or written, express or implied, between them with respect to the transaction contemplated herein." (JM Agreement, § 14.21.) Moreover, as established above, the "precontractual" representations that form the basis of the fraud and misrepresentation claims unambiguously contradict the written terms of the JM Agreement.

Counterclaimants suggest the merger clause became operative on the March 10, 2015 effective date of the JM Agreement and not when the contract was signed just prior to the March 31, 2015 closing, such that it would not foreclose them from relying on any misrepresentations made while the parties were negotiating their initial contributions throughout much of March 2015. (Def. Am. Resp. to Pla. MSJ, n. 9.) The Court disagrees with this interpretation. The language of the merger clause itself contemplates that all prior agreements and promises have been merged into the written agreement such that it would preclude reliance on any misrepresentations that occurred prior to its execution. Regardless, even if the merger clause took effect on March 10, 2015, the JM Agreement requires any amendment be made in writing and signed by all members, thus Jubilee Development and Minchew Enterprises could not reasonably rely on any oral

representation about their required initial capital contributions made after March 10, 2015. (JM Agreement, § 14.14.)

ii. Promissory Estoppel Counterclaim

Plaintiffs seek summary judgment on the promissory estoppel counterclaim, asserting promissory estoppel does not lie where a written contract exists, and Counterclaimants responded that this claim was a permissible alternate theory of recovery. See O.C.G.A. § 9-11-8(e)(2); Baker v. GOSI Enterprises, Ltd., 351 Ga. App. 484 (2019) (promissory estoppel is alternate theory of recovery to breach of contract). The Court rejects Counterclaimants' position. "When neither side disputes the existence of a valid contract, the doctrine of promissory estoppel does not apply, even when it is asserted in the alternative." Am. Casual Dining, L.P. v. Moe's Sw. Grill, L.L.C., 426 F. Supp. 2d 1356, 1371 (N.D. Ga. 2006); see also Bouboulis v. Scottsdale Ins. Co., 860 F. Supp. 2d 1364, 1379 (N.D. Ga. 2012) ("Georgia law bars a claim for promissory estoppel in the face of an enforceable contract.") Here, Counterclaimants do not dispute the enforceability of the JM and JIH Agreements. In the preliminary statement accompanying their counterclaims, they noted some counts "may be subject to agreements to arbitrate entered into between these parties . . ." (Am. Answer and Counterclaims, filed October 31, 2018, p. 2.) Subsequently, as the parties have informed the Court, certain counterclaims are now being arbitrated under the provisions of the JIH Agreement. Having acknowledged the enforceability of the operating agreements at the heart of this transaction, Counterclaimants are foreclosed from pursuing this alternate theory of recovery.

In their response brief, Counterclaimants appear to expand on their original promissory estoppel claim, arguing they relied on "post-Operating Agreement promises" by continuing development and management activity efforts on the Property so as to earn fees for JM that would

offset their capital contributions. (Def. Am. Resp. to Pl. MSJ, p. 30.) Gryder v. Conley, 352 Ga. App. 891 898 (2019) outlines the essential elements of a promissory estoppel claim.

> (1) the defendant made a promise or promises; (2) the defendant should have reasonably expected the plaintiffs to rely on such promise; (3) the plaintiffs relied on such promise to their detriment; and (4) an injustice can only be avoided by the enforcement of the promise, because as a result of the reliance, plaintiffs changed their position to their detriment by surrendering, forgoing, or rendering a valuable right.

As to the final element, the development and management activities performed for JIH on behalf of JM were contemplated as part of the development deal and associated contracts. Accordingly, the Court cannot discern that Jubilee Development or Minchew Enterprises changed their positions in reliance on any promise made by Plaintiffs after entering into the JM Agreement and the JIH Agreement.

5. CONCLUSION

In light of the foregoing, it is hereby **ORDERED** that Plaintiffs' Motion for Summary Judgment be **DENIED** as to Plaintiffs' Count I for Declaratory Relief and Count II for Breach of Contract and that it be **GRANTED** as to Counterclaimants' Count III for Fraud in the Inducement, Count IV for Negligent Misrepresentation, Count V for Conspiracy to Commit Fraud/Misrepresentation, and Count VI for Promissory Estoppel.

SO ORDERED this 30th **day of October, 2020.**

Kelly Lee Ellerbe

KELLY ELLERBE, JUDGE signing on behalf of
ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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